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Private Law: Prescription

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tinuous unilateral reinscriptions without adjudication or settlement of a claim. The ordinary prescriptions under the Civil Code are subject to interruption by acknowledgment, but by reason of the strict interpretation of this statute the prescription provided would be a peremptory one like a period of forfeiture.

PRESCRIPTION

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ACQUISITIVE PRESCRIPTION

Occasionally, the juxtaposition of circumstances produces curious results. If a squatter occupies a piece of property without any color of right but physically fences it in and keeps everybody out, he is possessing "as owner," and after thirty years he acquires the legal ownership by acquisitive prescription. On the other hand, when a municipality revokes the dedication of certain streets which then revert to the ownership of private individuals, who are unaware of the revocation, such persons do not possess "as owners" and cannot prescribe. This latter situation happened in the case of *Arkansas Fuel Oil Corp. v. Weber.*[1] Since the revocation ordinance had not been recorded, the transactions based on the existing records were protected. The public records doctrine prevails against an unrecorded assertion of ownership, but it yields to a proper claim of acquisitive prescription. An unrecorded basis of ownership being precluded, the attempt was made to plead good faith prescription, but lack of knowledge of the unrecorded revocation ordinance prevented possession "as owner."[2] Presumably, the ordinance could not be a "just title" either, since the person did not know about it and could not claim it as the basis of a belief of ownership. There is unavoidably something disturbing about the conclusion that a person to whom ownership of property has reverted is denied the benefits of this ownership because the municipality failed to notify him or to record its revocation ordinance, without belaboring the fact that the municipality

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1. 149 So. 2d 101 (La. App. 2d Cir. 1963), *writ refused, judgment correct,* 244 La. 205, 151 So. 2d 493 (1963).

2. LA. CIVIL CODE art. 3478 *et seq.* (1870).

itself (as record owner) derived the financial benefits of the mineral lease on the property.

When land is not fit for cultivation or habitation, it is not so easy to establish the kind of possession necessary for thirty-year prescription. A good discussion of this problem, together with the citation of several relevant cases, is found in *Hamilton v. Bowie Lumber Co.*[3] In this case, the court had no difficulty in finding the requisite possession of swamp land where there had been carried on the raising and grazing of cattle, cutting of timber and crossties, trapping, patrolling and posting of signs, mineral leasing and geophysical operations, for a period in excess of thirty years. However, where the only proven activity was the infrequent and spasmodic cutting of timber, the court held in *Watkins v. Zeigler*[4] that this does not constitute possession "sufficiently adverse" for the thirty-year prescription. Whether this same activity would suffice as possession for the ten-year prescription in good faith with just title was not relevant and was not discussed, but conceivably a different conclusion might have been reached.[5]

LIBERATIVE PRESCRIPTION

The law provides different periods of time for the liberative prescription of different kinds of causes of action. Presumably, there were adequate policy reasons for these variations, although it might be questioned whether it would not be a more satisfactory system for our present times to have only one or two broad classifications instead of the extremely numerous and open systems in existence. Be that as it may, the classification of the nature of the cause of action is often the critical factor of decision. Thus, where suit is brought more than one year after accrual of the cause of action but less than ten years, the issue may be whether the right claimed is *ex delicto* or *ex contractu.* In *Reserve Ins. Co. v. Fabre,*[6] the trial court's judgment for plaintiff was reversed by the court of appeal and then reinstated by the Supreme Court. An automobile insurer paid the collision damages to the insured and then as subrogee brought the present suit against the borrower of the car whose

3. 147 So. 2d 680 (La. App. 1st Cir. 1962).
4. 147 So. 2d 435 (La. App. 2d Cir. 1962).
5. *Cf.* Veltin v. Haas, 207 La. 650, 21 So. 2d 862 (1945); Ellis v. Prevost, 13 La. 230 (1839).
6. 243 La. 518, 149 So. 2d 413 (1963), reversing 140 So. 2d 438 (La. App. 1st Cir. 1962), petition for writ of certiorari denied, 84 Sup. Ct. 49 (1963).

negligence had caused the accident. Both the trial court and court of appeal treated the suit as one in tort, differing on a question of interruption of the one-year prescriptive period. This point of view was in keeping with the parties' pleadings, which were based on the same idea. Only upon rehearing in the court of appeal was the *ex contractu* classification introduced. All too often, the thought of car accident damage is quickly taken to be synonymous with tort. Upon a more careful analysis of the facts and relationships, the Supreme Court pointed out that the borrower's responsibility to the car owner derives from the loan contract between them, and that the borrower's obligation to preserve and restore the thing is the basis for his responsibility in damages when he fails to do so.[7] Therefore, the action is based on a claim for reparation *ex contractu* and subject only to the ten-year liberative prescription.[8] That the borrower's negligence was the cause of the accident does not change the contractual relationship between the lender and the borrower nor the *ex contractu* responsibility of the latter. The distinction between delictual fault and contractual fault must be maintained.[9]

The problem of how to classify legal relations resulting from medical and dental services has given rise to some confusion. Under Civil Code article 3538, the actions of physicians and surgeons are prescribed by three years; it would be natural to include dentists (dental surgeons) in this class. However, where a prior contract is made for the professional services to be rendered, it has been held that there is a contract between the parties and therefore the ten-year prescription applies.[10] In another case, it was held that a physician's bill is an "open account" unless there is a contract.[11] Similarly, an original claim for services, subject to three-year prescription under article 3538, shifted to the ten-year general contract prescription where the nature of the cause of action had been changed by a written acknowledgment of the indebtedness.[12]

In the case discussed above,[13] the distinction between delictual fault and contractual fault was well explained and prop-

7. LA. CIVIL CODE art. 2891 *et seq.*, especially art. 2898 (1870).
8. *Id.* art. 3544.
9. See citations to French authorities Planiol, Laurent, and Dalloz in 149 So. 2d at 416.
10. Gore v. Veith, 156 So. 823 (La. App. Orl. Cir. 1934).
11. Myer v. Esteb, 75 So. 2d 421, 426 (La. App. 1st Cir. 1953).
12. Hotard v. Fleitas, 67 So. 2d 345 (La. App. Orl. Cir. 1953).
13. Reserve Ins. Co. v. Fabre, 149 So. 2d 413 (La. 1963).

erly maintained. A similar question was in issue in the case of *Phelps v. Donaldson*,[14] where an orthodontist was defendant in an alleged malpractice suit. The Supreme Court affirmed the decision of the court of appeal, holding that the action was one in tort prescribed by one year, and was not *ex contractu* because there had been no undertaking to "warrant" the success of the work. The law on malpractice has developed pretty much within the framework of torts. Without going into the merits of this, from the point of view of legal analysis or social policy, it suffices to limit the present discussion to the classification of a relationship in order to fix the applicable period of prescription. In the case under discussion, both the Supreme Court and court of appeal accepted the idea that the ten-year prescription would apply if the orthodontist had agreed to *warrant* the success of his work, that is, that the relationship would have been *ex contractu* and the claim would have sounded in contract. This acceptance of the idea that the doctor-patient relationship may be changed to a contractual relationship governed by the ten-year prescription cannot logically be limited to a contract of warranty; it should be just as significant for any specific contract as distinguished from the simple rendition of medical or dental services without discussion about what is involved or about price. There may well be sound argument to question the acceptance of any distinction altogether, but if it does exist, why should it be limited to a contract of warranty? There is room for "contractual fault" in other contracts as well.[15] Orthodontists generally require a written contract with a down payment and monthly payments for their services, and this puts the relationship on a "contract" basis. Whether there was failure to perform properly the duties of the contract was never heard because the action was dismissed on the plea of one-year prescription *ex delicto*.

If the orthodontist has a ten-year prescription within which to assert his claims,[16] the patient should have the same period to assert claims arising out of the same relationship. However, while keeping them the same, it would be more in accord with what appears to be the intent of the codifiers to subject them

14. 142 So. 2d 585 (La. App. 3d Cir. 1962), *aff'd*, 150 So. 2d 35 (La. 1963).

15. Notwithstanding Sizeler v. Employers' Liability Assur. Corp., Ltd., 102 So. 2d 326 (La. App. Orl. Cir. 1958), cited as authority in 142 So. 2d at 587. See also discussion of this question in Kozan v. Comstock, 270 F.2d 839 (5th Cir. 1959); and Don George, Inc. v. Paramount Pictures, Inc., 145 F. Supp. 523 (W.D. La. 1956).

16. Gore v. Veith, 156 So. 823 (La. App. Orl. Cir. 1934).

both to the three-year prescription of article 3538. The omnibus provision of article 3544 establishes the ten-year prescription for "all personal actions, except those before enumerated." These other prescriptions of one and three and five years cover many contractual relationships, such as sale, employment, transportation, lease, loan, and so forth. Likewise enumerated are the legal relationships arising between master and servant, attorney and client, doctor and patient, and so forth. If the attorney and client or doctor and patient discuss and agree on the service to be rendered and the fee to be charged, this does not change their relationship and it could not have been intended that such preliminary consensus would have the effect of changing the applicable prescription.

Perhaps the best answer would be to take a more realistic and more simplified view about the whole matter. Instead of having so many different prescriptive periods, with the resulting manipulation of the classification of the nature of the cause of action, all liberative prescriptions could be made uniform at ten years, or perhaps limit the groups to two, using the five- and ten-year terms. This would also take into account the tremendous change in the modern economic system which is so much predicated upon an extremely extensive credit basis, because the theory and policy of liberative prescription are that a creditor loses his right by reason of his failure to exercise it within a certain period during which he could have done so.

Another case involving a question of classfication of the nature of the cause of action was *Louisiana Industries, Inc. v. Gibbens Bros. Const. Co.*[17] The supplier under a building contract sued the defaulting contractor and his surety, and the latter pleaded the statutory one-year prescription from the recordation of the acceptance of the work.[18] However, since the surety had entered into an agreement through correspondence promising to pay the amount offered and accepted in full release, there had been a novation which extinguished the original obligation and substituted a new one.[19] Accordingly, the appropriate prescription was ten years under Civil Code article 3544.

In *Succession of Danneel*,[20] the decedent had been an inter-

17. 144 So. 2d 630 (La. App. 4th Cir. 1962).
18. LA. R.S. 9:4814 (1950).
19. LA. CIVIL CODE arts. 2185 *et seq.*, 2189(1) (1870).
20. 152 So. 2d 29 (La. 1963).

dict prior to her death and the curator had filed a provisional account (including a doctor's bill) which was approved and homologated by the district court. This account was not rendered contradictorily with anyone, nobody had been notified, there was no proof and no hearing. Such an account is not *res judicata,* and did not interrupt the prescription which ran against part of the doctor's claim for services. A minority of the court would have granted a rehearing to consider whether there had been a suspension of the running of time between the start of the interdiction suit and the appointment of a curator. This is not mentioned expressly in the official opinion of the court, but a negative answer is necessarily implicit. The prescription in this case was running against the doctor and not against the interdict, but since there is so little material on this particular point, it would have been useful to have a good discussion and open treatment of the question whether during this period the doctor had any avenue of recourse which he had failed to exercise.

MINERAL RIGHTS

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MINERAL LEASES

Implied Covenants

Kimbrough v. Atlantic Refining Co.[1] raises the question of the applicability of the implied covenant of diligent development under an agreement compromising a dispute over lease development. One producing well had been drilled on plaintiffs' lease. As a result of a demand for further development a compromise agreement was executed. Defendant lessee agreed to release all but ninety acres of the leased tract. The agreement also provided that lessee would be free of further development obligations, except to protect against drainage, and that the lease would remain in force as to the retained acreage "so long as production is being obtained from said tract."[2]

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1. 152 So. 2d 412 (La. App. 1st Cir. 1963).

2. The pertinent portion of the agreement in question reads as follows: "In consideration for the partial release so granted by Atlantic, lessors acknowledge that said mineral leases are and shall remain in full force and effect insofar as